

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 24

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

MAILED

OCT 29 1999

Ex parte JOHANNES H. MEGENS

**PAT. & T.M. OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES**

Appeal No. 1999-0277
Application 08/747,873¹

ON BRIEF

Before CALVERT, McQUADE and NASE, Administrative Patent Judges.
McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Johannes H. Megens appeals the final rejection of claims 1 through 4 and 6 through 21. Claim 5, the only other claim pending in the application, stands objected to as depending from

¹ Application filed November 13, 1996 for the reissue of U.S. Patent No. 5,042,103, issued August 27, 1991, based on Application 07/487,892, filed March 6, 1990. According to the appellant, the instant application is a continuation of Application 08/532,415, filed September 22, 1995, abandoned.

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a rejected base claim. We affirm-in-part and enter new rejections pursuant to 37 CFR § 1.196(b).

The invention relates to "a bridge for making a connection between a loading platform and a vehicle, wherein the bridge is hingedly connected to the platform, and wherein the height at the side of the vehicle is variable" (specification, column 1, lines 5 through 9). A copy of the appealed claims appears in the appendix to the appellant's amended main brief (Paper No. 22).

The references relied upon by the examiner as evidence of obviousness are:

Phillips et al. (Phillips)	3,659,899	May 2, 1972
Smock	3,784,255	Jan. 8, 1974
Scott	3,822,861	Jul. 9, 1974
Pfleger et al. (Pfleger)	3,902,213	Sep. 2, 1975
Beer, Australian Patent Document	18662/88	Jan. 1, 1989

The appealed claims stand rejected under 35 U.S.C. § 103(a) as follows:

- a) claims 1, 8 and 12 as being unpatentable over Phillips;
- b) claims 2, 6, 7 and 13 through 21 as being unpatentable over Phillips in view of Smock;
- c) claim 3 as being unpatentable over Phillips in view of Scott;
- d) claim 4 as being unpatentable over Phillips in view of

Beer; and

e) claims 9 through 11 as being unpatentable over Phillips in view of Pflieger.

Reference is made to the appellant's amended main brief and reply brief (Paper Nos. 22 and 20) and to the examiner's answer (Paper No. 19) for the respective positions of the appellant and the examiner with regard to the merits of these rejections.

Phillips, the examiner's primary reference, discloses a pneumatically-powered dumping system for use on a pickup truck (see Figures 1 through 5) or a loading dock (see Figure 6). As described by Phillips, the loading dock embodiment

includes the usual loading platform 62, but with a section 63 removed and hingedly attached thereto at 64. A floor 65 is provided beneath the section 51 [sic, 63] and a collapsible, gas impervious bag 66 . . . is placed on the floor, beneath the section 63. A flexible hose 67 then extends from the inside of the bag out through a front wall of the loading platform 62 so that it can be connected to a vehicle exhaust pipe or to a by-pass connector such as is shown at 68 in FIG. 5, in the hose connecting the bag of a dump unit with the exhaust pipe of the dump truck.

In any event, exhaust gases forced under pressure into bag 66 will expand the bag to raise the section 63 about its hinge connection 64 [column 3, lines 14 through 27].

As conceded by the examiner (see page 4 in the answer), Phillips' loading dock system does not meet the limitations in independent claim 1 requiring the base of the recited loading

bridge to be "inclined." As shown in Figure 6, the base (floor 65) in the Phillips loading dock system is not disclosed as being inclined. Nevertheless, the examiner has concluded that "[i]t would have been obvious to incline the base (floor 65) in the same way that a roof, sidewalk, driveway, or garage floor is inclined in order to facilitate drainage of liquids therefrom" (answer, page 4).

Rejections based on 35 U.S.C. § 103 must rest on a factual basis. In re Warner, 379 F.2d 1011, 1017, 154 USPQ 173, 177-78 (CCPA 1967). In making such a rejection, an examiner has the initial duty of supplying the requisite factual basis and may not, because of doubts that the invention is patentable, resort to speculation, unfounded assumptions or hindsight reconstruction to supply deficiencies in the factual basis. Id.

The examiner's conclusion that it would have been obvious to incline Phillips' loading dock floor 65 rests on the completely unfounded assumption that it would be desirable to drain liquid from the floor. The Phillips reference, however, is devoid of any indication that liquid might accumulate on the floor or that such accumulation would pose a problem even if it did occur. It is therefore apparent that the examiner has resorted to improper speculation and hindsight reconstruction to overcome the admitted

deficiency of Phillips vis-a-vis the subject matter recited in claim 1.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claim 1, or of claims 8 and 12 which depend therefrom, as being unpatentable over Phillips.

We also shall not sustain the standing 35 U.S.C. § 103(a) rejections of claims 2, 6 and 7 as being unpatentable over Phillips in view of Smock, of claim 3 as being unpatentable over Phillips in view of Scott, of claim 4 as being unpatentable over Phillips in view of Beer and of claims 9 through 11 as being unpatentable over Phillips in view of Pfleger. Each of these claims depends, either directly or indirectly, from independent claim 1. Suffice it to say that none of the Smock, Scott, Beer and Pfleger references cures the aforementioned shortcoming of Phillips relative to the limitations in parent claim 1.

Phillips also fails to meet the limitations in independent claim 13 requiring an inflation means ventilator positioned under the base. The examiner's reliance on Smock to rectify this failure is also unsound.

Smock discloses a dump vehicle comprising a chassis frame 10, a plurality of dump bodies 12 pivoted to the chassis frame for dumping to the same side of the vehicle, and air bag

assemblies 35 for controlling the orientation of the dump bodies. Each air bag assembly includes a lower end secured to the chassis frame and an upper end secured to a respective dump body by a clamping ring unit 37. Air tanks 48 disposed on the front of the chassis frame supply the air bag assemblies with pressurized air under the control of valves 46. As best shown in Figures 2, 3 and 4, the periphery of each air bag assembly is spaced inwardly from the periphery of its dump body.

There is nothing in the combined teachings of Phillips and Smock which justifies the examiner's conclusion that "[i]t further would have been obvious . . . to locate a ventilator under the base of Phillips" (answer, page 5). The examiner's rationale that this modification would have been suggested "in order to reduce the number and length of supply lines, and to protect the ventilator from adverse weather, heavy machinery, abuse, and/or vandalism" (answer, page 5) is another example of hindsight reasoning.

Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of claim 13, or of claims 14 and 15 which depend therefrom, as being unpatentable over Phillips in view of Smock.

Independent claim 16 recites a loading bridge for making a

connection between a loading platform and a vehicle comprising, inter alia, a pivotally connected planar member and an inflatable body for pivoting the planar member. It is not disputed that Phillips meets all of the limitations in this claim except for those requiring the periphery of the inflatable body to be spaced inwardly from the periphery of the planar member.

As noted above, Smock discloses air bags having peripheries which are spaced inwardly from the peripheries of their respective dump bodies. Given Smock's discussion of the beneficial efficiencies of such air bags (see, for example, column 1, lines 15 through 34), the examiner's conclusion (see page 5 in the answer) that it would have been obvious to one of ordinary skill in the art at the time the invention was made to provide Phillips' inflatable body (bag 66) and planar member (section 63) with a similar peripheral relationship is well founded.

Accordingly, we shall sustain the standing 35 U.S.C. § 103(a) rejection of claim 16 as being unpatentable over Phillips in view of Smock.

We also shall sustain the standing 35 U.S.C. § 103(a) rejection of claims 17 through 19, which depend from claim 16, as being unpatentable over Phillips in view of Smock since the

appellant has not challenged such with any reasonable specificity, thereby allowing these claims to stand or fall with their parent claim (see In re Nielson, 816 F.2d 1567, 1572, 2 USPQ2d 1525, 1528 (Fed. Cir. 1987)).

We shall not sustain the standing 35 U.S.C. § 103(a) rejection of claims 20 and 21 as being unpatentable over Phillips in view of Smock. For the reasons expressed below, we consider the scope of these claims to be indefinite. Therefore, the standing prior art rejection thereof must fall since it is necessarily based on speculative assumption as to the meaning of the claims. See In re Steele, 305 F.2d 859, 862-63, 134 USPQ 292, 295 (CCPA 1962). It should be understood, however, that our decision in this regard is based solely on the indefiniteness of the claimed subject matter, and does not reflect on the adequacy of the prior art evidence applied in support of the rejection.

The following rejections are entered pursuant to 37 CFR § 1.196(b).

Claims 20 and 21 are rejected under 35 U.S.C. § 112, second paragraph, as failing to particularly point out and distinctly claim the subject matter the appellant regards as the invention.²

²Our review of the appealed claims also indicates that the recitation in each of independent claims 1, 13, 16 and 20 that the front edge of the substantially planar member is movable in a
(continued...)

The scope of claim 20, and claim 21 which depends therefrom, is indefinite due to the recitation in claim 20 of "means for detachably connecting" an upper surface of the inflatable flexible body with the lower surface of the planar member.

This means-plus-function limitation must be construed under the sixth paragraph of 35 U.S.C. § 112 as covering the corresponding structure described in the specification and equivalents thereof. See In re Donaldson Co., 16 F.3d 1189, 1193, 29 USPQ2d 1845, 1848 (Fed. Cir. 1994). If the specification fails to set forth an adequate disclosure showing what is meant by such limitation, the claim in effect fails to particularly point out and distinctly claim the invention as required by the second paragraph of 35 U.S.C. § 112. Id. at 16 F.3d 1194, 29 USPQ2d 1850.

The appellant's specification does not disclose any structure for connecting the upper surface of the inflatable flexible body (either bag 22 or bellows 41) with the lower

²(...continued)

direction perpendicular to the surface to which the rear edge portion of the planar member is hinged is not accurate since the hinged relationship between the planar member and the surface would preclude such perpendicular movement. This informality is deserving of correction (perhaps by changing "perpendicular" to --substantially perpendicular--) in the event of further prosecution before the examiner. The lack of proper antecedent basis for the term "said means for inflating" in claim 2 is similarly deserving of appropriate correction.

surface of the planar member (plate 15), much less structure for "detachably" connecting these surfaces. The only connecting structure disclosed as being associated with the top surface of bag 22 consists of adhesive or buttons for connecting the bag with the lower side of a filling piece 19 welded to the lower surface of plate 15 (see column 2, lines 55 through 59). In the same vein, the only connecting structure disclosed as being associated with the top surface of bellows 41 consists of plates 45 and 49 for connecting the bellows 41 to spars 42 mounted on the lower surface of plate 15 (see column 4, lines 16 through 35). None of this connecting structure constitutes "means for detachably connecting" an upper surface of the inflatable flexible body with the lower surface of the planar member as recited in claim 20. Thus, the appellant's contention (see page 12 in the amended main brief and pages 2 and 3 in the reply brief) that the "means" in question reads on the buttons and/or adhesive disclosed in the specification is not well taken.

Claims 20 and 21 are also rejected under 35 U.S.C. § 112, first paragraph, as being based on a specification which fails to comply with the written description requirement of this section of the statute.

The test for determining compliance with the written

description requirement is whether the disclosure of the application as originally filed reasonably conveys to the artisan that the inventor had possession at that time of the later claimed subject matter, rather than the presence or absence of literal support in the specification for the claim language. In re Kaslow, 707 F.2d 1366, 1375, 217 USPQ 1089, 1096 (Fed. Cir. 1983). The content of the drawings may also be considered in determining compliance with the written description requirement.

Id.

Since the disclosure of the instant application as originally filed does not make any mention or showing of means for detachably connecting the upper surface of the inflatable flexible body with the lower surface of the planar member, it would not reasonably convey to the artisan that the appellant had possession at that time of the loading bridge now set forth in claims 20 and 21.

In summary:

a) the decision of the examiner to reject claims 1 through 4 and 6 through 21 is affirmed with respect to claims 16 through 19 and reversed with respect to claims 1 through 4, 6 through 15, 20 and 21; and

b) new rejections of claims 20 and 21 are entered pursuant

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to 37 CFR § 1.196(b).

In addition to affirming the examiner's rejection of one or more claims, this decision contains new ground of rejection pursuant to 37 CFR § 1.196(b) (amended effective Dec. 1, 1997, by final rule notice, 62 Fed. Reg. 53,131, 53,197 (Oct. 10, 1997), 1203 Off. Gaz. Pat. & Trademark Office 63, 122 (Oct. 21, 1997)). 37 CFR § 1.196(b) provides that "[a] new ground of rejection shall not be considered final for purposes of judicial review."

Regarding any affirmed rejection, 37 CFR § 1.197(b) provides:

(b) Appellant may file a single request for rehearing within two months from the date of the original decision. . . .

37 CFR § 1.196(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of proceedings (37 CFR § 1.197(c)) as to the rejected claims:

(1) Submit an appropriate amendment of the claims so rejected or a showing of facts relating to the claims so rejected, or both, and have the matter reconsidered

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by the examiner, in which event the application will be remanded to the examiner. . . .

(2) Request that the application be reheard under § 1.197(b) by the Board of Patent Appeals and Interferences upon the same record. . . .

Should the appellant elect to prosecute further before the Primary Examiner pursuant to 37 CFR § 1.196(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.


If the appellant elects prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.


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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART; 37 CFR § 1.196(b)

[illegible]


IAN A. CALVERT
Administrative Patent Judge


JOHN P. McQUADE
Administrative Patent Judge


JEFFREY V. NASE
Administrative Patent Judge

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